IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA

v. Case Nos. 2019MM002346AXXXNB
2019MM002348AXXXNB

ROBERT KRAFT,

Defendant.

DEFENDANT ROBERT KRAFT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF HIS MOTIONS FOR PROTECTIVE ORDER

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Defendant Robert Kraft respectfully submits this Reply Memorandum of Law in Further Support of His Motions for Protective Order and in response to arguments raised by the Media in their Supplemental Memorandum of Law in Support of Motion to Intervene and in Opposition to Amended Motion for Protective Order. *See* Dkt. No. 70 ("Opp." or "Opposition").[1]

PRELIMINARY STATEMENT

In their Opposition, the Media whistle past the straightforward propositions underlying Mr. Kraft's Motions for Protective Order. Instead, the Media resort to constructing and attacking straw persons and prognosticating about later stages of the proceedings where their arguments might find better purchase. As things presently stand, the Videos are exempt from public disclosure under multiple on-point provisions of the Florida Public Records Act—as law enforcement agrees and the Media do not meaningfully deny. On that basis alone, the Court should enter a protective order.

Above and beyond the statutory protections that attach as a matter of course, this case presents overwhelming grounds for entering a protective order. This Court is right now poised to decide, following a hearing set for April 26, whether the Videos at issue should be suppressed as unlawfully obtained. By no stretch of the imagination would it be sensible or appropriate for the very same Videos to be ***globally broadcast*** before the Court decides whether they must be ***constitutionally suppressed***. In grasping for such sensitive material in such precipitous fashion, the Media are giving short shrift to proper criminal procedure and the criminal defendant's constitutional rights. Especially at this stage of the proceedings, entry of a protective order is thoroughly justified, and, indeed, beyond reproach.

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[1] All docket number references in this memorandum of law relate to docket entries in Case No. 2019MM002348AXXXNB.

ARGUMENT

The Media make no serious argument as to why disclosure of the Videos would be appropriate at this stage of the proceedings. At most, they seem to oppose persistence of a protective order at later stages of the proceeding. Thus, while the Media make arguments as to why any use of the Video in this proceeding might, in their view, trigger rights of public access, they do not deny that discovery in this case has yet to commence and that Mr. Kraft himself has yet to receive the Videos for use in his defense. In this posture, entry of a protective order is essential to preserve the status quo and to protect the criminal defendant's established rights.

I. THE MEDIA FAIL TO DENY THAT THE VIDEOS ARE STATUTORILY EXEMPT FROM PUBLIC DISCLOSURE

In his Memorandum of Law in Support of His Motions for Protective Order, Mr. Kraft set forth multiple reasons why the Videos are exempt from public disclosure under Florida's Public Records Act. *See* Dkt. No. 67 ("Kraft Memo." or "Memorandum") at 3–8. That conclusion follows inexorably from on-point provisions of Florida law, as Florida law enforcement at the Jupiter Police Department ("JPD") agrees. Unable to engage those authorities, the Media in their Opposition elide them, putting them last (Opp. at 13–14), as though they might be lost in the shuffle. In fact, the cited provisions are dispositive for present purposes, as the Media effectively concede that the Videos ***currently are exempt*** from public disclosure. *See id.*

As a result, the Media are left arguing that, when this proceeding one day becomes "inactive," the Videos should be released at that later date. *See id.* Of course, any such dispute is premature and speculative—if it ever arises, then it can be teed up on a more fulsome record, with the benefit of this Court's intervening rulings (including on suppression), once these proceedings have run their course. For now, it suffices to reiterate that this proceeding is still

very much active and that the Videos qualify as both "criminal intelligence information" and "criminal investigative information," exempted from public disclosure as a matter of statutory command. *See* Kraft Memo. at 5; *see also* § 119.071(2)(c)(1), Fla. Stat.

The Media also rehash their earlier argument that the "active criminal investigative/intelligence information" exemption and the "victim" exemption have been somehow waived by the public release of ***other*** materials that purport to describe the substance of the Videos. *See* Opp. at 14. But that is spurious. The "victim" exemption, for one, is insusceptible to waiver. As Mr. Kraft noted in his Memorandum, § 119.071(2)(h)(1)(c) of the Public Records Act makes any "photograph, videotape, or image of any part of the body of the victim of a sexual offense" exempt from public disclosure ***and*** confidential. Because the Videos purportedly depict "victims of a sexual offense"—as maintained by the JPD—they are not only exempt from public disclosure but also ***confidential***. In any event, it is well established that limited references to evidence in publicly-disclosed reports do not waive the "active criminal investigative/intelligence information" exemption over that underlying evidence or other related materials. *See* Kraft Memo. at 7–8 (citing *City of Miami v. Post-Newsweek Stations Fla., Inc.*, 837 So. 2d 1002, 1004–05 (Fla. 3d DCA 2002) and *Barfield v. City of Ft. Lauderdale Police Dep't*, 639 So. 2d 1012, 1017 (Fla. 4th DCA 1994)). Indeed, it would defy common sense to deem protections for sensitive material waived by mere disclosure of a purported summary; a photograph or video, by its very nature, carries content and import quite apart from any purported description thereof.

Finally, the Media suggest that the Videos might "be redacted/or pixilated" to protect images of the purported victims of sexual offenses, while the remaining portion is publicized. Opp. at 14. But the Media's suggestion is expressly foreclosed by the relevant statute, which

states that any "photograph, videotape, or image of any part of the body of the victim of a sexual offense" shall be confidential and exempt from public disclosure "***regardless of whether the photograph, videotape, or image identifies the victim***." § 119.071(2)(h)(1)(c), Fla. Stat. (emphasis added). Simply stated, it does not matter under the "victim" exemption whether the purported victims can be identified or not. So long as the videotape portrays a "victim of sexual offense" that record, in its entirety, is confidential and exempt from public disclosure. *See id*. Nor would it be practicable or sensible to attempt the task of redacting or pixilating the entire Videos at issue before it has become clear what, if any, role particular portions are meant to play in this case—and whether they were unlawfully obtained at their inception.

In short, the Videos are statutorily exempt from public disclosure at this juncture. For this reason alone, the Court should enter a protective order preventing their release.

II. THE MEDIA FAIL TO DEMONSTRATE WHY A PROTECTIVE ORDER SHOULD NOT BE IN PLACE WHILE THE COURT CONSIDERS MR. KRAFT'S MOTION TO SUPPRESS

In his Memorandum, Mr. Kraft also argued that, given the pending prospect that the Videos may be suppressed as unlawfully obtained, a protective order should be in place at least while the Court considers whether to suppress the Videos. *See* Kraft Memo. at 11–12. The Media, with all due respect, have no sensible argument to the contrary. Although the Media term Mr. Kraft's suppression arguments "speculative and premature at best," Opp. at 4, Mr. Kraft's arguments are being made at precisely the right stage and in the right way, and they deserve the first order of business in this criminal case; there is no earthly reason why this Court would be ordering public dissemination of the Videos before it can decide whether they should be altogether suppressed. The suppression hearing is set for April 26, yet release of the Videos in advance of this Court's suppression ruling would preclude any prospect of meaningful relief. It follows that the Media should, at the very least, wait while the threshold suppression issue is litigated and decided over the coming weeks.

Tellingly, the Media have failed to identify ***any*** authority—in case law or otherwise—suggesting that this Court should authorize, in advance, publication of material that it is considering suppressing. The absence of any such authority from the Media's Opposition is at once conspicuous and unsurprising. Courts confronting this very issue have agreed that, while a motion to suppress is pending, protective orders or other measures should remain in place so as to prevent the premature, unauthorized public distribution of challenged material. *See, e.g.*, *United States v. Duran*, 884 F. Supp. 526, 528 (D.D.C. 1995) ("[I]t is the Court's determination that the most prudent course at this time—and one which takes into careful consideration the Defendant's right to a fair trial and the public's First Amendment right of access to the document in question—is to stay resolution of the [media's] request [for access] pending the hearing on the

Defendant's Motion to Suppress."); *United States v. Rodriguez*, 2006 WL 8438023, at *2 (D.N.D. June 29, 2006) ("Since the Court has yet to rule on [motions to suppress], there is a potential that these documents will reveal inadmissible evidence. The public is not entitled to access to inadmissible evidence."); *United States v. Rogers*, 2013 WL 5781610, at *4 (D. Minn. Aug. 2, 2013) (finding "no common law right to access the suppression hearing exhibits while [defendant's] motion to suppress the contents of those exhibits is pending"). The same reasoning and imperative hold here. The Court should, at a minimum, enter a protective order limiting the disclosure of the Videos until it can properly decide Mr. Kraft's Motion to Suppress, just as it is poised to do.

To the extent that the Court ultimately determines the Videos were unlawfully obtained, it follows that the public would ***not*** be entitled to such illegally obtained materials. *See, e.g.*, *United States v. Kemp*, 365 F. Supp. 2d 618, 631–32 (E.D. Pa. 2005) (recognizing that "the judicial system is not served by making illegally seized or inadmissible evidence available to the public"); *Rogers*, 2013 WL 5781610, at *4 (recognizing that, "[i]f the evidence is deemed inadmissible, the public will have no right to access it"); *Rodriguez*, 2006 WL 8438023, at *2 (recognizing that, if the evidence is suppressed, "[t]he public is not entitled to access to inadmissible evidence"). Only by protecting the Videos would the Court abide by the letter and spirit of the "fruit of the poisonous tree" doctrine and the policies it serves, including deterring police misconduct. *See Rodriguez v. State*, 187 So. 3d 841, 849 (Fla. 2015) ("[T]he exclusionary rule works to deter police misconduct by ensuring that the prosecution is not in a better position as a result of the misconduct. . . . If the prosecution were allowed to benefit in this way, police misconduct would be encouraged instead of deterred, and the rationale behind the exclusionary rule would be eviscerated."). Indeed, any different result would leave the Media serving as an

instrument of law enforcement—putting wrongfully obtained materials to their most damaging possible use in the public arena, thereby doing damage far surpassing any possible misdemeanor conviction, forever tainting any attainable jury pool, and rending suppression and the corresponding "fruit of the poisonous tree" doctrine toothless. Especially under the circumstances of this case, releasing the Videos would position the Media (already whipped into a frenzy by law enforcement) to do law enforcement's work for them at the expense of the criminal defendant. In that sense, release of the Videos would provide perverse incentives for law enforcement to repeat their illegal searches, secure in the knowledge that suppression would prove to be weak medicine for Fourth Amendment ills once the media injects itself.

According to the Media, however, the same Videos that are suppressed as illegally obtained should nonetheless be broadcast publicly. To advance that disturbing proposition, the Media contend that "the inadmissibility of evidence has no bearing on whether . . . evidence is or is not public record under Chapter 119." Opp. at 4. But the Media conflate ***suppressed*** evidence with ***inadmissible*** evidence. Mr. Kraft's instant concern is not about mere inadmissibility; his point is not, for instance, that the Videos have not been properly authenticated or established to be the best evidence. Rather, Mr. Kraft is contending that the Videos were ***illegally obtained in derogation of his core constitutional rights*** such that they should never have sprung into existence. Under these circumstances, the public has no right of access. *See*, *e.g.*, *Kemp*, 365 F. Supp. 2d at 631–32; *Rogers*, 2013 WL 5781610, at *4; *Rodriguez*, 2006 WL 8438023, at *2. As for the two cases cited by the Media, *Sjuts v. State*, 750 So. 2d 732, 733 (Fla. 2d DCA 2000) and *State v. Houston*, No. 13-CF-014443 (Fla. 13th Cir. July 17, 2014), neither involved situations where, as here, the evidence was obtained ***illegally*** in violation of a defendant's constitutional

rights. Those cases are inapposite because, as noted, the issue of evidentiary admissibility differs from that of suppression.[2]

III. THE MEDIA HAVE FAILED TO DEMONSTRATE WHY PUBLIC ACCESS SHOULD TRUMP MR. KRAFT'S PRIVACY RIGHTS

The Media also challenge Mr. Kraft's argument that his constitutional privacy rights should come before the public's right of access. *See* Opp. at 11–13. But the Media have things wrong here.

First, the Media contend that Mr. Kraft simply cannot seek a protective order on the basis of privacy concerns because Florida Rule of Criminal Procedure 3.220(*l*)(1) "is not intended to protect a criminal defendant's purported privacy rights." *Id.* at 11. By the Media's account, Rule 3.220(*l*)(1) allows only "victims" and not defendants to seek protective orders based on privacy concerns. In fact, Rule 3.220(*l*)(1) itself refutes the Media's reading. It states:

> On a showing of good cause, the court shall at any time order that specified disclosures be restricted, deferred, or exempted from discovery, that certain matters not be inquired into, that the scope of the deposition be limited to certain matters, that a deposition be sealed and after being sealed be opened only by order of the court, or make such other order as is appropriate to protect a witness from harassment, unnecessary inconvenience, or invasion of privacy, including prohibiting the taking of a deposition. All material and information to which a party is entitled, however, must be disclosed in time to permit the party to make beneficial use of it.

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[2] Nor is it the true that "inadmissible" evidence should never be shielded from public disclosure. To the contrary, courts routinely prevent public disclosure of highly prejudicial, potentially inadmissible evidence even when that evidence is not otherwise subject to a constitutional challenge. *See United States v. Beloff (Leland)*, 1987 WL 6995, at *1 (E.D. Pa. Feb. 18, 1987) (denying newspaper publisher's motion to access sealed exhibit because, "if there is any substance at all to the defendants' argument that the questioned evidence would be unfairly damaging, disclosure to the press at this stage would unnecessarily threaten the fairness of the forthcoming trial"); *see also In re Spokesman-Review*, 2008 WL 3084252, at *3 (D. Idaho Aug. 5, 2008) (denying media outlets' request for exhibit to be unsealed because it "relates to potential testimony and/or evidence that may be presented in this matter or, alternatively, could be deemed inadmissible" because "the Court has a legitimate concern with protecting the compelling interest of a fair trial by impartial jurors").

Fla. R. Cr. P. 3.220(*l*)(1).

By its plain terms, Rule 3.220(*l*)(1) requires the Court to enter a protective order, upon a showing of good cause, in a variety of circumstances, including, ***but not limited to***, when necessary to "protect a witness from harassment, unnecessary inconvenience, or invasion of privacy." Fla. R. Cr. P. 3.220(*l*)(1). There are ***other*** circumstances warranting entry of a protective order under Rule 3.220(*l*)(1), including when the Court determines that "specified disclosures [should] be restricted, deferred, or exempted from discovery," or that "certain matters [should] not be inquired into." *Id.*[3]

Second, the Media argue that, because Mr. Kraft is a criminal defendant (as distinct from a non-party), his privacy rights must necessarily yield to public access. The Florida Supreme Court in *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113 (Fla. 1988), however, has squarely rejected that view. In *Barron*, the Court observed "it is generally the content of the subject matter ***rather than the status of the party*** that determines whether a privacy interest exists and closure should be permitted." *Id.* (emphasis added); *see also State v. Rolling*, 1994 WL 722891, at *3 (Fla. Cir. Ct. July 27, 1994) (recognizing that "[t]he Public's interest in the disclosure of public records pursuant to statute is to be balanced against the privacy rights of the subjects of those records"). It is therefore irrelevant that Mr. Kraft here happens to be a criminal defendant. He is no less entitled than any other American is to the complete, vital protections of

[3] *In support of their argument that Rule 3.220(l)*(1) cannot be read to authorize a protective order vindicating a defendant's privacy rights, the Media rely on several abbreviated, one-page, unpublished rulings. Those rulings offer no persuasive analysis, nor do they govern here. *See Miller v. State*, 980 So. 2d 1092, 1094 (Fla. 2d DCA 2008) ("Only the written, majority opinion of an appellate court has precedential value."); *see also State v. Bamber*, 592 So. 2d 1129, 1132 (Fla. 2d DCA 1991), *approved,* 630 So. 2d 1048 (Fla. 1994) ("[O]ur appellate structure encourages independent legal analysis at the judicial level where precedent is created, and endeavors to assure that conflicts will be rapidly resolved. Trial courts perform a very important, but a very different, function in our judicial system. Trial courts do not create precedent . . . even in the adjacent courtroom.").

the U.S. Constitution, including as to his Fourth Amendment right to privacy. To the extent that the JPD trampled his privacy rights by taking illicit videos, Mr. Kraft is entitled to remedy and protection, and the mere fact that he has been criminally accused should not change that equation. Indeed, the Media should have no more claim to the Videos in this case than it would, say, in a stalking case where videos had been improperly taken. Given the "imminent threat to [Mr. Kraft's] privacy rights" here, Florida law compels sealing of the Videos. *Post-Newsweek Stations, Fla. Inc. v. Doe*, 612 So. 2d 549, 551 (Fla. 1992).

IV. THE MEDIA HAVE FAILED TO DEMONSTRATE THAT MR. KRAFT'S SIXTH AMENDMENT RIGHTS SHOULD YIELD TO PUBLIC ACCESS RIGHTS

Finally, the Media have failed to demonstrate that the public's right of access should trump Mr. Kraft's core constitutional right to a fair trial as guaranteed to him under the Sixth Amendment to the U.S. Constitution. "[W]here a defendant's right to a fair trial conflicts with the public's right of access, it is the right of access which must yield." *Palm Beach Newspapers, Inc. v. Burk*, 504 So. 2d 378, 380 (Fla. 1987). The high-intensity media coverage surrounding this case ratchets up the obligation to protect the defendant's right to a fair trial. *Morris Pub. Grp., LLC v. State*, 13 So. 3d 120, 121 (Fla. 1st DCA 2009). Contrary to the Media's suggestion, Mr. Kraft has not asked for a gag order or a total sealing of ***all*** evidence in this case. Nor has he asked for anything approaching that. All Mr. Kraft asks is that especially sensitive, inflammatory evidence not be broadcast around the world before trial even commences.

Mr. Kraft's right to a fair trial is gravely at risk. The media coverage of this misdemeanor case has been extraordinary and unrelenting, to a degree that has scarce precedent.[4] Although the Media use that fact to suggest that there is nothing left to withhold, Opp. at 9–10,

[4] The one case cited by the Media bears no resemblance. *See* Opp. at 6–8. In *Provenzano v. State*, the cited coverage involved "straight news stories of a factual nature" and "had nothing to do with the defendant personally." 497 So. 2d 1177, 1182 (Fla. 1986).

that suggestion is rather silly. Media coverage—even especially intense media coverage—of a criminal case does not equate with media coverage of ***specific, problematic, inflammatory evidence*** that would be put before a jury. Mr. Kraft's point is that the Media should not be getting out in front of a jury when it comes to hashing out and deliberating over forensic evidence—particularly evidence of a prurient and therefore highly prejudicial nature. The continuing public and media fascination with even the most banal aspects of this case well confirms that any video release stands to trigger dissemination far and wide, at which point no *voir dire* or venue transfer could ever provide a satisfying cure.

The Videos, by their very nature, are qualitatively different from the evidence that has been publicized to date. Courts recognize that video and visual news coverage is especially likely to taint a jury pool. *See, e.g.*, *Rideau v. State of La.*, 373 U.S. 723, 726 (1963); *Coleman v. Kemp*, 778 F.2d 1487, 1538–40 (11th Cir. 1985). It defies common sense to deny, as the Media do (Opp. at 9–10), that release of the Videos would spark prejudicial media coverage. Whatever else may be swirling around the media, courts decline to release specific forensic evidence that would prejudice, as here, a defendant's right to a fair trial. *See, e.g.*, *Morris Pub. Grp.,* 13 So. 3d at 121 (affirming denial of access to "lengthy audiotape" in case "considerable public interest" regarding attempted murder of Jacksonville Jaguar player in order to "ensure the defendant's right to a fair and impartial jury"); *see also* Kraft Memo. at 7–8. And the Media have no right of "blanket access" to unfiled materials that will prejudice a defendant's fair trial rights before trial occurs. *Burk*, 504 So. 2d at 382–84; *see also Miami Herald Pub. Co. v. Lewis*, 426 So. 2d 1, 6 (Fla. 1982).

As for the cases the Media cite for the proposition that Mr. Kraft's fair trial rights would not be prejudiced by release of the Videos, Opp. at 5–10, they are readily distinguishable. *See*

Rolling v. State, 695 So. 2d 278, 287 (Fla. 1997) (defendant failed to timely raise issue of pretrial publicity: "it appears that even he was not concerned or otherwise disturbed by the extent or nature of the coverage at any time during the three years he awaited trial"); *see also Bundy v. Dugger*, 850 F.2d 1402, 1425 (11th Cir. 1988) (many months had passed between publicity and trial). Here, Mr. Kraft is doing everything he can to vigorously and expeditiously preserve his rights to a fair trial. With a jury trial now set to begin in a month, Mr. Kraft asks merely that the Court protect against release of the Videos that would otherwise threaten to infect the jury pool.

CONCLUSION

For the reasons set forth above and in the Joint Motion for Protective Order, the Amended Motion for Protective Order, and the Memorandum of Law in Support of Mr. Kraft's Motions for Protective Orders, the Court should grant these motions and enter the Proposed Protective Order filed on March 21, 2019.

I hereby certify that a copy of the foregoing has been furnished by E Service to all parties of record on this 12th day of April, 2019.

Respectfully Submitted,

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